Petition

81-707

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1981

GARY PAUL MILLER,
PETITIONER,

vs.

STATE OF NEW JERSEY,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

GARY P. MILLER, ESQ.
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QUESTIONS PRESENTED

Does the New Jersey Supreme Court nonliteral interpretation of New Jersey Supreme Court rule 1:24-1(c) have a rational connection to a valid legislative purpose as applied?

Does the adoption of New Jersey Supreme Court Rule 1:24-1(c) and 1:24-2(b) as applied to Petitioner deny Petitioner his due process of law under the Fourteenth Amendment of the United States Constitution?

Does the adoption by the New Jersey Supreme Court of Court Rule 1:24(c) and 1:24-2(b) as applied to Petitioner deny Petitioner his First Amendment rights of speech and association?

Does the New Jersey Supreme Court adoption of Court Rule 1:24-1(c) and 1:24-2(b) as applied to Petitioner deny Petitioner his right to travel under the United States Constitution?

Does the New Jersey Supreme Court bar waiver procedure violate the equal-protection and due-process clauses of the Fourteenth Amendment and the due-process clause of the Fifth Amendment of the United States Constitution?

CERTIFICATION AS TO INTERESTED PARTIES

The undersigned Petitioner certifies that the following listed parties have an interest in the outcome of this case. These representations are made to enable justices of the court to evaluate possible disqualifications or reclusal.

There are no other interested parties other than those named in the captions of this case and their attorneys of record.

GARY P. MILLER

In Pro Persona

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OPINIONS BELOW

The New Jersey Supreme Court summarily denied Petitioner's Petition for Relaxation of R-1:24-2(c). Said Order was filed on July 9, 1981, a true copy of which is attached hereto as Appendix "A".

JURISDICTION

The judgment of the New Jersey Supreme Court was entered on July 9, 1981, and copies thereof are appended to this Petition in the appendix. The jurisdiction of this Court is invoked under 28 USCA 1343.

STATUTES AND REGULATIONS INVOLVED

New Jersey Court Rule 1:24-1(c) states:

> "An applicant for admission to the Bar of this state who has sat for the Multi-State . . . may . . . petition the Court for admission on the basis of such examination . . . without further examination in this state . . . and shall meet all other requirements for admission to practice as set forth in these rules."

New Jersey Court Rule 1:24-2 states:

> "No person shall be admitted to the Bar Examination unless he first presents . . . (b) certification by a duly authorized officer of his law school that it is approved by the American Bar Association and that it has awarded him a . . ."

STATEMENT

This Petition for Writ of Certiorari arises from the fact that the New Jersey Supreme Court has denied the Petitioner a waiver of that Court's requirement that the Petitioner be a graduate of an American Bar Association-accredited school, even though under the New Jersey Supreme Court Rules Petitioner is exempt from that State Bar Examination and in fact the New Jersey Supreme Court has in fact issued an order to that effect.

Petitioner graduated from Transylvania University, 1971, B.A. [see **American Bar Association Journal,** December, 1978, Vol. 64, 1868, 1969]. Petitioner matriculated unsuccessfully at the John Marshall Law School (Chicago) from June, 1971, to February, 1973.

Petitioner alleges at that point in time John Marshall Law School, an American Bar Association-accredited law school, did have a policy of accepting a large entering class and graduating a smaller senior class, i.e., 850 freshment, approximately 110 of whom graduated. Petitioner further alleges upon information and belief that some of his other classmates who either resigned and/or were dismissed for academic deficiency, including a senior on "law review," at John Marshall have since graduated from other law schools, some American Bar Association-accredited, and are also practicing attorneys. Petitioner attributes his failure at John Marshall to immaturity at the time and Petitioner's fear of failure and an inability to handle that fear.

Petitioner, upon being dismissed from John Marshall Law School, returned to New Jersey; then deciding to continue with legal studies, was faced with choosing between two unaccredited schools: Delaware Law School or Mid-Valley College of Law. Mid-Valley College of Law would enable Petitioner to take the Bar Exam in at least one state; Delaware Law School could only promise an effort toward American Bar Association accreditation.

Petitioner loves the law and the practice thereof. It was unforseeable and speculative at best whether Delaware Law School would become accredited. Petitioner prays that it was not an unfortuitous choice, the practice of law over a mere possibility thereof.

Petitioner matriculated at the Mid-Valley College of Law from September, 1973, and received his Juris Doctor degree in May, 1976. Mid-Valley College of Law has since merged with and is now known as San Fernando College of Law. Said school is accredited by the State Bar of California.

Petitioner's father was admitted to the State Bar of New Jersey in 1935 after graduating from South Jersey Law School (now Rutgers University, Camden). Petitioner's father is now 71 years old and is a sole practitioner. Petitioner would like to lighten Petitioner's father's burden and carry on the family reputation of honesty, integrity, and service to the community. Petitioner alleges that South Jersey Law School was not accredited by the American Bar Association. Petitioner further alleges that

other alumni of South Jersey have been appointed Judges in the State of New Jersey. Query: Are those members of the alumni of South Jersey School of Law any less proficient in their legal skills for lack of accreditation by the American Bar Association?

Petitioner was born in Philadelphia, Pennsylvania, and was raised in Burlington County, New Jersey.

Petitioner successfully satisfied the requirements of the State of California. Petitioner's license to practice law is not limited in any way or manner, and carries with it the same rights, privileges, and duties as those granted attorneys who have graduated from an American Bar Association-accredited school. Petitioner was admitted to practice in the United States District Court for the Central District of California on August 31, 1977.

(a) As a prerequisite to taking the California Bar Exam, Petitioner was required to pass the First-Year Law Students' Exam. This exam consists of four essay-type questions and 100 Multi-State Bar Exam-type questions covering the topics of Torts, Crimes, and Contracts. Petitioner passed on his first effort June 4, 1974. [Two thousand two hundred seventeen (2,217) persons sat for said exam; 1,829 or 37.4 percent passed, and 1,388 or 62.6 percent failed.]

(b) The State Bar of California requires that specific courses be completed successfully to qualify for the Bar Exam. Thus, Petitioner's basic course of study was essentially the same as that required in any American Bar Association-accredited school in California, i.e., UCLA, Stanford, USC, etc.

(c) Petitioner passed the California Professional Responsibility Exam on his first attempt.

(d) Petitioner sat unsuccessfully for the California July, 1976, Bar Exam. Petitioner was unsuccessful by **16** points. Petitioner achieved a score on the Multi-State Bar Exam portion of that exam sufficient to have passed the same exam in New Jersey, i.e., 147.

(e) Petitioner passed the February, 1977, California Bar Exam with a score high enough to have passed in New Jersey. The California Bar Examination at that time consisted of three parts, and all parts had to be successfully completed: the Professional Responsibility Exam [see (c) above; this portion could be completed separately], one and one-half days of essay questions, and one day of Mult-State Bar Exam questions. A passing score was 1,200 points, combined with the essays counting 70 percent.

On June 29, 1977, Florence R. Pescoe, Clerk of the Supreme Court of the State of New Jersey, responded to Petitioner's request to be admitted to the New Jersey Bar on the basis of Petitioner's Multi-State Bar Examination score and informed Petitioner that Petitioner qualified for admission without further examination. Pursuant to that letter, Petitioner, on July 14, 1977, petitioned the Supreme Court for admission based on the aforementioned Multi-State Bar Examination score.

On July 21, 1977, the Supreme Court of New Jersey issued an Order that Petitioner is deemed to have satisfied the Bar Examination requirements; Petitioner will be deemed eligible to take the attorney's oath.

On August 6, 1977, pursuant to that Order, Petitioner submitted all the appropriate documents required for the admission procedure.

On August 13, 1977, the aforementioned forms were returned to Petitioner with a letter dated August 9, 1977, from Emerald Louis Erickson, Staff Attorney for the Supreme Court of New Jersey, setting forth the following:

> "New Jersey Court Rule 1:24-2(c) specified that an applicant for admission must have completed his law studies at a law school approved by the American Bar Association. Therefore, we are unable to process your application for admission to the Bar . . ."

During September, 1977, Petitioner filed with the New Jersey Supreme Court a Petition for Relaxation of Qualifications Court Rule 1:24-2(c). In said Petition, Petitioner reserved the right to re-petition the New Jersey Supreme Court at a later date setting forth all the constitutional issues raised by the aforementioned facts.

On September 27, 1977, Petitioner's motion was denied without a hearing and no opinion was issued by the New Jersey Supreme Court.

On April 21, 1981, Petitioner filed with the New Jersey Supreme Court a Petitioner for Relaxation of Qualifications of Court Rule 1:24-2(c).

On July 9, 1981, Petitioner's Petition was denied without a hearing and no opinion was issued by the New Jersey Supreme Court. Petitioner is informed and be-

lieves and thereupon alleges that within the past twenty-five years the New Jersey Supreme Court has only exercised its discretion in waiving the Court Rule with regard to admitting a non-ABA law-school graduate; and further there are no written criteria and standards for waiver of said Rules nor does the waiver procedure provide for a hearing.

ARGUMENT

I.

DOES A NONLITERAL INTERPRETATION OF RULE 1:24-1(c) HAVE A RATIONAL CONNECTION TO A VALID LEGISLATIVE PURPOSE AS APPLIED?

In **Potter vs. New Jersey Supreme Court,** 403 F. Supp. 1036, former Rule 1:24-2(c) was upheld. Thus, a candidate to sit for the Bar Exam must be a graduate of an approved law school.

A literal interpretation of Rule 1:24-1(c) is that an applicant attorney is exempt from Rule 1:24-2 in its entirety.

Petitioner admits that his interpretation is not one given to Rule 1:24-1(c) by the New Jersey Supreme Court.

Petitioner contends that the New Jersey Supreme Court's interpretation is not logically compatible as applied to that Court's Order of July 21, 1977, stating, "It is ORDERED that Petitioner is deemed to have **satisfied the Bar Examination requirement in the state."** Rule 1:24-2 requires **prior proof** of an applicant of his or her qualifications to be able to take the Bar Examination.

Thus, any nonliteral interpretation of Rule 1:24-2 is arbitrary and capricious.

Further, Petitioner contends that the New Jersey Supreme Court is estopped from denying admission to the Petitioner by finding that Petitioner is not qualified for admission to the examination [Rule 1:24-(b)], yet at the same time having issued the Order of July 21, 1977, exempting Petitioner from the Bar Exam requirement.

In **Ostroff, vs. New Jersey Supreme Court,** 415 F.Supp. 325, 327, the Court maintained that the State has a substantial interest in requiring high standards of qualifications for those admitted to practice law and the only constitutional requirement is that the standards of qualifications have a rational connection with the applicant's fitness or capacity to practice.

Here the Court's interpretation and/or application of Court Rule 1:24-2(b) as applied to 1:24-1(c) have no rational connection with an applicant's fitness or capacity to practice law and "is applied on the basis of criteria which bear no rational relationship to a legislative goal," **Jimenez vs. Weinberger** 417 U.S. 638, 638, 94 S.Ct. 2496, 41 L.Ed. 2d 363; **Department of Agriculture vs. Murry,** 413 U.S. 508, 513-514, 93 S.Ct. 2832, 37 L.Ed. 2d 767. Here Petitioner is already a licensed attorney who has demonstrated his ability on a nationwide examination, twice competing (successfully, according to the New Jersey Supreme Court's standards) against other examinees who have graduated from "approved" schools. Further,

Petitioner contends that the interpretation is arbitrary and capricious and deprives Petitioner and others similarly situated of the following constitutional rights: due process of law under the Fourteenth and Fifteenth Amendments, equal protection under the Fourteenth Amendment, the right to freedom of speech and association under the First Amendment, Petitioner's right to travel and his right to family as defined as a liberty within the Fourteenth Amendment of the United States Constitution. In addition thereto, Petitioner contends that the "petitioning procedure" deprives Petitioner of procedural due process, substantive due process, and equal protection as defined within the Fifth and Fourteenth Amendments to the United States Constitution.

II.

DOES THE ADOPTION OF COURT RULES 1:24-2(b) AS APPLIED TO PETITIONER DENY PETITIONER DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

The application of the Court Rule creates an irrebuttable presumption that although Petitioner is exempt from the Bar requirement, Petitioner is deemed unfit to practice law in New Jersey.

In **Cleveland Board of Education vs. LaFleur,** 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed. 2d 52 (1974), this Court struck down a Board of Education regulation requiring

that every pregnant school teacher take a maternity leave without pay, beginning five months prior to the expected birth of her child, and that the school teacher also provide notice of her pregnancy to the Board of Education.

This Court recognized freedom of personal choice in matters of marriage and family life as one of the liberties protected by the due-process clause of the Fourteenth Amendment. **Roe vs. Wade,** 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147; **Skinner vs. Oklahoma,** 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655; **Eisenstock vs. Baird,** 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed. 2d 349. This Court went on to say, "[Due process] requires such rules must not needlessly, arbitrarily, or capriciously impinge on this vital area of a teacher's constitutional liberty."

This Court questions whether the Rule sweeps too broadly, citing **Shelton vs. Tucker,** 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed. 2d 231, and after citing a line of cases standing for the proposition that the due-process clause require a more individual determination, the Court declared the regulation violative of due process.

Although **Weinberger vs. Salfi,** 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed. 2d 522, is thought to limit the line of cases with regard to irrebuttable presumptions, it can be distinguished from the facts at hand, and, in reality, only explains **Cleveland vs. LaFleur. Salfi** involved a widow who filed applications for mother's insurance benefits for herself and child's insurance benefits for her daughter by previous marriage [which] were denied by the Social

Security Administration... solely on the basis of duration... of... relationship requirements of Section 416(c)(5) and (e)(2) [of the Act which] excluded surviving widows and stepchildren who had their respective relationships to a deceased wage earner for less than nine months prior to his death.

The Court held that the standard for testing the validity of Congress' Social Security classification was clearly stated in **Fleming vs. Nester,** 361 U.S. 603, 611, 80 S.Ct. 1367, 1373, 4 L.Ed. 2d 435 (1960), "Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as [Social Security], we must recognize that the due-process clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in **rational** justifications." The Court cited similar language from **Richardson vs. Belcher,** 404 U.S. 74, 92 S.Ct. 254, 30 L.Ed. 231, and **Dandridge vs. Williams,** 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed. 2d 491.

We hold that **Stanley vs. Illinois,** 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 551, which refers to the fact that "right to conceive and raise one's children have been deemed essential' " **Vlandis vs. Kline,** 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed. 2d 63, and **LaFleur,** in which we stated that, "Freedom of personal choice in matters of marriage and family life is one of the 'liberties' protected by due process," are not controlling on the issue before us now.

The Court in **Weinberger** clearly set for the standards for testing the constitutionality of "irrebuttable presumptions," those that affect business or industry are to be tested by a compelling State-interest standard," . . . a noncontracted claim to receive funds from the public treasury enjoys no constitutional protected status," 422 U.S. 749, 772.

The right to life, liberty, and the pursuit of happiness includes the right to work and earn an honest living. **Vanzandt vs. McKee,** 202 F.2d 490, 491. In **Brown vs. Supreme Court of Nevada,** 476 F.Supp. 86, 89 (overruled on other grounds **Brown vs. Board of bar Examiners,** 623 F.2d 605), the Court stated, "In one case at bar, the State of Nevada, by and through its Supreme Court, is denying Plaintiff her freedom to practice and to continue her chosen lawful profession; such right falls within the 'liberty' concept of the Fourteenth Amendment, and is protected against a reasonable State interference." **Board of Regents vs. Roth,** 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 35 L.Ed 2s 548; **Gilmour vs. New York State Racing and Wagering Board,** 405 F.Supp. 458, 459-460 (SDNY 1975). In **LaFleur, supra,** the State argued that, "The cut-off date for pregnant teachers was necessary to maintain continuity of classroom instruction, and that at least some of the teachers became physically incapable of adequately performing a certain number of their duties during the latter period of pregnancy . . ."

This Court found if continuity were a legitimate State interest, the notice provisions serve a wholly rational basis, but that the cut-off date was arbitrary and had no rational relationship to the valid State interest of preserving continuity of instruction in the classroom.

In the case at hand, the New Jersey Supreme Court has a duty to protect the public, but do the Court Rules in issue sweep too broadly? Petitioner argues they do. Petitioner, an out-of-state attorney, has twice achieved a sufficiently high score to have passed the New Jersey exam. Petitioner's education was strictly controlled by the California Supreme Court, which has one of the highest reputations within the legal community. The California Bar Exam has a reputation of being one of the most difficult in the nation, and the Multi-State portion is a national exam. Petitioner merely seeks to return to New Jersey to be with his family and practice his profession. The New Jersey Court Rules clearly deny Petitioner the right to earn a living in his chosen profession and subsequently banish Petitioner from his family. Thus, the Rule affects two of Petitioner's fundamental rights: those of family life and "right to earn a living"; therefore, the constitutional standard must change from the rational-basis set forth in **Ostroff, supra,** to the compelling-State-interest standard [see **Weinberger, supra**]. As in **LaFleur,** the Rule cuts off Petitioner's rights without any flexibility for those rights; therefore, the Rules must fall and Petitioner must be allowed to practice his chosen profession in his home state.

III.

PETITIONER'S FIRST-AMENDMENT RIGHTS OF SPEECH AND ASSOCIATION

Today Petitioner knows of no case which sets forth the proposition that there is a fundamental right to education under the United States Constitution, although Petitioner does admit that some states' constitutions do provide a right to education. This Court, in **Brown vs. Board of Education of Topeka,** 347 U.S. 483, 74 S.Ct. 646, 98 L.Ed. 473, stated:

> "Today education is perhaps the most important function of the state and local governments. Compulsory school attendance law and the great expenditures for education both demonstrate our recognition of the importance of education toward democratic society. It is required in the performance of our most basic public responsibility, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, preparing him for the later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succed in life if he is denied the opportunity of an education. Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms."

Although this Court was correct in its assessment of the importance of an education in today's society, the Court, in dealing with the major issue of equal protection, overlooked the underlying rationale of why an education is so important to a democratic society.

Not only does an education include the teaching of "Speech," the written and spoken word and the communication thereof, education is speech in its purest form, the freedom to communicate ideas. The communication of ideas not only from one generation to the next, but from professor to student, student to professor, and from student to student, classroom interaction between participants is "speech." Academic freedom is one of our cherished concepts. Where, more than in the classroom of a law school, with the **Socratic** method, could this be more true? Yet, the within-cited articles tend to show that the American Bar Association (the New Jersey Supreme Court's) standards are not only discriminatory, noncompetitive, arbitrary, and capricious in nature, they limit the Petitioner's right to speech and association guaranteed by the First Amendment of the United States Constitution. If they be not directly limited, these Rules at least have chilling effect upon Petitioner's rights.

In **Bates vs. Arizona,** 433 U.S. 350, 380, 97 S.Ct. 2691, 53 L.Ed. 2d 810, this Court set out the following rule:

"The First Amendment overbreadth doctrine, however, represents a departure from the traditional rule that a person may not challenge a statute on the grounds that it might be applied unconstitutionally in circumstances other than those before the Court, i.e., **Broderick vs. Oklahoma,** 413 U.S. 601 (1973); **United States vs. Raines,** 362 U.S. 17, 21 (1960); **Ashwander vs. TVA,** 297 U.S. 288, 347 (1936) [Brandeis, J., concurring]. The reason for the special rule in First Amendment cases is apparent: An overbroad statute might serve to chill protected speech. First Amendment interests are fragile interests and a person who contemplates protected activity might be discouraged by the **in terrorem** effect of the statute. See **NAACP vs. Button,** 371 U.S. 415, 433 (1963). Indeed, such a person might choose not to speak because of uncertainty whether his claim of privilege will prevail if challenged. The use of overbreadth analysis reflects a conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted."

The effect of the Court Rule is that if you want to practice law in New Jersey, you must attend an American Bar Association-approved school (that teaches according to the American Bar Association accreditation rules). Further, the law directly affects one's right to freedom of

association in that American Bar Association-accredited schools only have a minority enrollment of approximately nine percent. [See within, Page 23.] Accreditation standards have a chilling effect in that the law schools tend not to experiment with educational programs. Common sense tells us of a fear of either a revocation or a refusal to accreditate for a failure to follow American Bar Association guidelines.

IV.

PETITIONER'S RIGHT TO TRAVEL

The Court Rules in issue and their application violate Petitioner's right to travel. "Although the right finds no explicit mention in the Constitution . . . freedom to travel throughout the United States has long been recognized as a basic right under the Constitution." **United States vs. Guest,** 383 U.S. 745, 757-758, 86 S.Ct. 1170, 1178, 166 L.Ed. 2d 239. Not only has the right to interstate travel received constitutional protection, it has, in some circumstances, been recognized as being among those "fundamental rights" protected by strict judicial scrutiny. **Shapiro vs. Thompson,** 374 U.S. 618, 89 S.Ct. 1322, 22 L.Ed. 2d 600 (1960); **Dunn vs. Bloomstein,** 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed. 2d 274; **Memorial Hospital vs. Maricopa County,** 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed. 2d 306 (1974). Equal-protection analysis, of course,

is two-tiered. Ordinarily, a legislative classification need only have been rationally related to a legitimate State purpose to satisfy the demands of the Fourteenth Amendment. Classifications based on suspect criteria, such as race or nationality, which affect interests denominated as "fundamental," call for strict judicial scrutiny and are constitutionally infirm unless they are demonstrably necessary to the promotion of the compelling State interest. [See **Shapiro vs. Thompson, supra,** 394 U.S. at 655, 89 S.Ct. 1322 (Harland, Jr. dissenting).] A central question here is whether the Court Rules penalize the exercise of Plaintiff's right to interstate travel to such a degree as to invoke strict scrutiny analysis.

In **Shenfield vs. Prather,** 387 F.Supp. 676, Plaintiffs, graduates of an ABA-accredited school, challenge Mississippi Bar admission standards that require a Bar Examination and a six-month residency requirement for all persons seeking admission to the Mississippi Bar except graduates of the State-supported university school of law and attorneys who had practiced in a State granting reciprocal admission privileges to Mississippi attorneys.

In **Shenfield,** the Plaintiffs' thesis was that the two groups who comprise the disenfranchised class of Bar applicants are placed in that class solely because they have exercised their right to travel by attending accredited law schools elsewhere and by seeking to enter Mississippi as practicing attorneys. The penalties imposed by the State Bar cannot stand, Plaintiffs argued, unless necessary

to protect a compelling State interest. Plaintiffs asserted that no such interest was present and that the examination requirement was valid, at least insofar as it applied to them and to members of their class.

Plaintiffs contended in the alternative that the classification is created by the diploma and the reciprocity exemption was arbitrary and not related to any legitimate State purpose, hence, violative of equal protection, even when judged by their traditional rational-relation standard of review, **supra,** at 683.

In **Shenfield,** the Court first acknowledged the right to travel and then, in the context of the facts so presented, discussed whether the strict-scrutiny analysis or the traditional rational-basis standard was to be used as the standard for testing the facts before the Court. The Court then concentrated its analysis on the six-month residency requirement. Citing **Shapiro vs. Thompson, supra,** the Court quoted the following:

> "We imply no view of the validity of the waiting period of residency requirements determining the eligibility to vote, the eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling State interest on one hand or, on the other, may not promote penalties upon the exercise of the constitutional right of interstate travel." **Shapiro, supra,** at 683, 721, 89 S.Ct. at 1333.

The Court went on to cite **Vlandis vs. Kline, supra,** for the principle that not all durational residency requirements burden interstate travel sufficiently to trigger the strict-scrutiny analysis of **Shapiro.** The Court cited **Memorial Hospital vs. Maricopa County, supra,** at 256-257, 94 S.Ct. 1076. Standing for the rule of law in determining whether the fundamental right to travel is sufficiently impeded to activate the strict-scrutiny analysis, the amount of actual impact on the right is dispositive. This impact may occur in two contexts. First, the Court considers the extent to which State action deters interstate travel. Secondly, regardless of any deterrent effect, the Court examines a severity of the penalty imposed on those who exercise a right to travel. In **Shenfield,** the Court goes on to say, "In determining the extent to which the interstate travel is penalized, we understand the Supreme Court's inquiry to focus on the gravity of the particular governmental benefit denied." In **Dunn vs. Bloomstein, supra,** the Court found that the denial of the franchise, "a fundamental political right," **Reynolds vs. Simms,** 377 U.S. 533, 562, 84 S.Ct. 1362, 1382, 12 L.Ed. 2d 506 (1964), was a penalty requiring the application of the compelling-State-interest test. In **Shapiro,** the Court found denial of the basic "necessities" to be a penalty. Nonetheless, the Court has declined to strike State statutes requiring one year of residence as a condition to lower tuition at State institutions of higher education.

Whatever the ultimate perimeter is of the **Shapiro** penalty analysis, it is at least clear that medical care is as much [a basic neces. ity of life] to indigents as welfare is assistance. Governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of entitlement. **Memorial Hospital, supra,** 415 U.S. at 259, 94 S.Ct. at 1082-1083. The Court in **Shenfield** goes on to cite **Memorial Hospital** for the proposition that at least in the absence of hard evidence of a deterrent effect on interstate migration, only classifications which deprive newly arrived residents of "vital governmental benefits and privileges" will be held to impose penalties on the right sufficient to trigger strict-scrutiny analysis. Conversely, classifications which cause disadvantages to interstate travelers, but to a considerably lesser degree, do not impinge on the fundamental right to travel and must withstand only the rational-relation examination. In **Shenfield,** the Court found the residential requirement prior to taking the Bar Examination only a classification which causes disadvantage to interstate travelers but to a considerably lesser degree and therefore does not impinge on the fundamental right to travel. Thusly, the Court applied the rational-relation standard and found for Defendants.

In the case at hand, Petitioner is an interstate traveler who traveled from his home in the State of New Jersey to pursue his legal education in the State of California. Now,

as in the past, Petitioner seeks to return home to his family. The Court Rules as applied to Petitioner do not require a durational residency requirement but require Petitioner to reside within the State of New Jersey and/or have his principal office within the state. Petitioner is not challenging those Court Rules. However, Petitioner is denied his right to return to **his family** and earn a living in his chosen profession under the Court Rules. Thus, the Court Rules have a strong deterrent on interstate travel, preventing attorneys who have attended non-ABA-accredited schools in other states from migrating to New Jersey. Thus, in the instant case, the proper analysis would be under the one of strict scrutiny. If the State of New Jersey has a compelling State interest to protect its citizens from non-qualified attorneys, and Petitioner has a constitutional right to travel, then the issue is: Do the Court Rules impinge on Petitioner's fundamental right to travel? The answer is clearly yes. If the Court is to balance the State's rights against Petitioner's rights, we are faced with a similar situation as in **LaFleur, supra.** In **LaFleur,** the Court found that the rule swept too broadly and, by implication, found that rule too inflexible. Here we are faced with a similar situation of the rule requiring graduation from an ABA-accredited law school that sweeps too broadly in light of Petitioner's right to interstate travel, coupled with his right to be with his family.

V.

THE WAIVER PROCEDURE VIOLATES THE EQUAL-PROTECTION AND DUE-PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT AND THE DUE-PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION

The New Jersey Supreme Court has relaxed the Court Rules in the past; thus, there is an issue of equal protection raised similar to the issue by the Court in **Brown vs. Supreme Court of Nevada, supra.**

In **Murphy vs. Egan, et al.,** 498 F.Supp. 240 (dismissed "moot" 639 F.2d 772), the Court found a violation of due-process clause of the Fourteenth Amendment in the Pennsylvania Bar admission procedure. The Court stated:

> "Yet Pennsylvania has also decided to permit the waiver of the ABA-approved school requirement an ad hoc procedure by which they may nevertheless seek admission. Such an admissions procedure, administered by means of the waiver, must be operated in accordance with the due-process guarantees of the Fourteenth Amendment. Waivers may not be granted or denied arbitrarily or capriciously, or without definable reasons or standards. In the absence of any guiding principles which may be pointed to as forming the basis of a waiver decision, there is no indication that due process has been adhered to. There is no intimation of the rational basis on which the Court's discretion has been exercised.

> Due process will not allow the exercise of unfettered discretion, or the use of improper criteria. While we have no reason to believe, nor de we mean to infer that this or any other waiver decision was the result of an improper exercise of discretion in violation of the Fourteenth Amendment, we simply do not know, and neither do Plaintiff or other graduates of non-ABA-accredited law schools who wish to be admitted to the Bar in Pennsylvania. No reasons have been given, and no standards or guidelines for issuance or denial or waivers have been established. Applicants for admission to the Bar by way of the waiver procedure are entitled to know the criteria which must be met in order to be granted a waiver."

In the pamphlet, "Admission to the Bar, State of New Jersey," April, 1976, at Page 6, Item 3 states as follows:

> "3. Relaxation of Qualifications. The Supreme Court has, in special situations on petition, granted relaxation of certain qualifications for admission to a Bar Examination on a case-by-case basis. The Clerk of the Supreme Court will provide information about petitioning for relaxation."

Here, as in **Murphy,** the New Jersey Supreme Court waiver criteria, if any, is unkown. Further, in 1977 this Court issued a one-line denial of Petitioner's Petition. Petitioner alleges that in 1977 when he inquired as to

requirements and criteria for a Petition waiver, the Court employee (female) Petitioner spoke to stated, in substance, "Just make up a Petition, no particular format, original and eight copies."

If the New Jersey Supreme Court has never adopted a policy to relax the rules, that in itself may be an abuse of discretion by failing to exercise discretion. **Turesky vs. Superior Court,** 218 P.2d 784, 785; **Salute vs. Pitches** 132 Cal. Rptr. at 347.

Petitioner further argues that the New Jersey Supreme Court cannot now create criteria that would exclude Petitioner, and is now estopped from denying this Petitioner in that, in 1977, Petitioner detrimentally relied on that Court's aforementioned representation that there was a waiver procedure.

The next issue that arises is whether the New Jersey Supreme Court's procedure for petitioning for a relaxation of a Court Rule meets the standards for procedural due process under the Fifth Amendment of the Constitution of the United States. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right, they were notified." **Baldwin vs. Hal,** 68 U.S. 223. See **Windor vs. McVeigh,** 93 U.S. 274; **Hovey vs. Elliott,** 167 U.S. 409; **Grannis vs. Ordean** 234 U.S. 385. "It is equally fundamental that the right to notice an opportunity to be heard must be granted at a meaningful

time and in a meaningful manner." **Armstrong vs. Munzo,** 380 U.S. 545, 552. In the instant case, the New Jersey Supreme Court rejected both Petitioner's 1977 Petition and 1981 Petition, without notice and an opportunity to be heard. At this time, Petitioner will not argue the issue of the form of the hearing needed, but will argue that the factual issues are analogous to the issues raised by an applicant rejected due to the Committee on Character finding a candidate not fit to practice law, Anno., 2 ALR3d 1226 (1965). **Konigsberg vs. State Bar,** 353 U.S. 252, 262-264 (1957), **Willner vs. Committee on Character and Fitness,** 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed. 2d 224 (1963).

VI.

DENIAL OF EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

The New Jersey Supreme Court's adoption of Court Rule 1:24-2(b) and its interpretation and/or application of Court Rule 1:24-2(c) creates a class of people which consists of the following: out-of-state attorneys who attended non-ABA-accredited schools and who have scored more than 145 points on the Multi-State Bar Examination.

First, Petitioner will note that between 1971 and 1978, total minority enrollment in ABA-approved law schools

almost doubled, from 5,568 to 9,922. [See **Review of Legal Education in the United States,** Fall 198, American Bar Association, 1979, Page 61.] In 1971, the American Bar Association-accredited schools had a total enrollment of 93,118, or minority enrollment of 5.9 percent; and in 1978, the American Bar Association-accredited schools had a total enrollment of 122,606, or a minority enrollment of eight percent, id. at 63, an increase of approximately two percent in seven years! At Page 54 of the above-cited pamphlet, the American Bar Association provides enrollment statistics for nonaccredited schools (from those schools that supplied enrollment statistics). Yet the American Bar Association did not give minority enrollments broken down for nonaccredited schools that supplied enrollment statistics. Petitioner will not speculate for the American Bar Assoication's failure to provide same.

American Bar Association standards are discriminatory and noncompetitive in nature. American Bar Association accreditation standards stem from a trend of discrimination and anti-competitive devices that began in the late 1920's. See "Democracy and the Legal Profession — Cautionary Notes," by Robert Stevens, **Learning in the Law,** Fall 1976, Pages 12, 16. Mr. Stevens states, "It was an effort to keep black and immigrant groups — especially Jews — out of the legal profession." A New York delegate to the American Bar Association — [emphasis added], put it more bluntly:

"The need to have lawyers able to read write, and talk the English language — not Bohemian, not Gaelic, not Yiddish, but English . . . the question of access to the legal profession, especially for minorities, is directly tied to the accreditation process. . ."

John Silber, president of Boston University, in his article "Cutting Through Academic Inequity," **Learning in the Law** Fall 1976, Page 8, points out a few of the absurdities in the American Bar Association standards, i.e., Standard 405 requiring that compensation should be sufficient to attract and retain persons of high ability, and compensation should be reasonably related to the prevailing compensation of comparably qualified private practitioners, etc., limits a new school from financially getting off the ground. It also limits the school's ability to attract more qualified part-time professors, i.e., a Superior Court judge to teach a class at night, or a private practitioner with a masters in taxation and an income well over $100,000 a year may be willing to teach one course, but the fewest of schools could match his income. Yet nowhere within Rule 405 does the standard describe criteria for determining who is a good professor. The Library Standards 601-605 are financially oppressive in that they do not take into consideration the fact that a branch of the County Law Library might be within walking distance or that several other law-school or university libraries are within driving distance.

As reported in the July 19, 1979, **Los Angeles Daily Journal,** 1975, the American Bar Association Section of Legal Education and Admission to the Bar, appointed a committee to examine the long-standing accreditation ban on proprietary schools. After the committee made its study, the committee was not happy with its results... that there was little difference between accredited nonprofit and nonaccredited proprietary schools. The committee decided a more extensive study was needed. The committee arranged for the American Bar Foundation, an independent research arm of the American Bar Association, to prepare an in-depth study. The report was completed in 1971. It concluded, in substance, that:

> "[Schools organized on a proprietary basis were not] inherently inferior to other law schools simply because of their financial structure. At least among unaccredited law schools, proprietary status and quality are not necessarily related. Virtually no evidence has been found to support the view that the group in which comparison is possible, the financial structure of the proprietary schools make them inherently inferior to nonproprietary schools."

Donna Fossum, a research attorney for the American Bar Foundation who was in charge of the above-referenced study, is quoted as follows:

> "Despite the importance of the American Bar Association accrediting standards and program

> for the legal profession and the public, few efforts have been made to explore their influence on the structure of legal education. Virtually no attempts have been made to examine the validity of any of the standards; we don't know what a quality legal education really is. We know that Harvard is good . . . but we're not sure what makes Harvard good." **Los Angeles Daily Journal,** Friday, July 20, 1979.

Dean Gorfinkle, former dean of Golden Gate University Law School in San Francisco and a consultant on legal education and accreditation to the California Committee of Bar Examiners, is quoted in the aforementioned July 20 article as saying:

> "I think that some of our better California accredited law schools are probably providing a quality education that is superior to a lot of American Bar Association-approved law schools outside of California."

The Affirmative Action programs of the '60s and '70s were an attempt to correct the discrimination that had developed within our institutions [see **Regents of the University of California vs. Bakke,** 98 S.Ct. 2733, 438 U.S. 265, 57 L.Ed. 2d 750], but the only way to totally eliminate the effect of past and continuing discrimination is to allow alternative and competitive paths to the same goal.

In **Goldfarb vs. Virginia State Bar,** 421 U.S. 773, this court, in striking down the Virginia State Bar and the County Bar fee schedule, found the fee schedule uncompetitive in nature; that the County Bar fee schedule violated Section 1 of the Sherman Act in that the fee schedule was enforced through the prospect of professional discipline by the State Bar, **supra** at 781, 782, and the legal profession was involved in interstate commerce, titled examination, **supra,** at 785. In addition, a trade or profession is not exempt from the Sherman Act, **supra,** at 787.

The fact that the State Bar is a State agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. **Gibson vs. Barryhill,** 411 U.S. 564, 578-579, 93 S.Ct. 1689, 36 L.Ed. 2d 488.

If the New Jersey Supreme Court takes the position that its adoption, interpretation, and application of Court Rules 1:24-2(c) and (b) is State action and exempt from the Sherman Act as set forth in **Bates vs. State Bar of Arizona, supra,** in that the rule challenged is an affirmative command of the State Supreme Court and thus the restraint is "compelled by direction of the State acting as a soverign," 421 U.S. at 791, such position will bolster Petitioner's argument that the actions taken in the name of enforcing the standards of the American Bar Association are attributable to this State.

The American Bar Association was held not to be a State instrumentality in **Consumer's Union of the United States, Inc., et al,. vs. American Bar Association,** 427 F.Supp. 506, but that case can be distinguished from the case at hand. In **Consumer's Union vs. American Bar Association,** Plaintiffs were seeking declaratory relief that Defendants had violated First and Fourteenth Amendment rights of Plaintiffs to gather, publish, and receive consumer information on attorneys and to permanently enjoin disciplinary rules that prohibited most advertising by attorneys. The Court found as follows:

> "The American Bar Association receives no public funds, nor does it enjoy any special privileges under Virginia law; it is not chartered or licensed by the State; it is not specifically regulated by the State; and it does not possess any disciplinary powers that can substantially affect one's practice of law in the State. It does, however, through education programs, counseling, and the drafting of model provisions, influence the manner in which the State Bar carries out its responsibilities of overseeing the practice so drafted are not binding on the State Bar; however, the State Bar acts independently of the American Bar Association and may, without incurring any form of retribution, reject its advice. These functions of educating, counseling, and lobbying do not, without more, consti-

tute State action within the meaning of the Federal provisions pertinent to this case." 427 F.Supp. 506.

In the case at hand, the Court, by adopting Court Rule 1:24-2(b) is delegating its constitutional responsibility, New Jersey Constitution, Article 6, Section 2, Page 3, to the American Bar Association. In the common-law courts, the detemination of who is qualified to become an attorney and who is not rests exclusively with the Court. **Ex parte Seconbe,** 60 U.S. 9, 19 How. 9, 15 L.Ed. 565.

In **Burton vs. Wilmington Parking Authority,** 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed. 2d 856, this Court set forth the rule that private conduct abridging individual rights does do violence to the equal-protection clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it. This Court cites **Cautch vs. Riverport Pilot Commissioners,** 330 U.S. 552 at 556. Only by shifting the facts and weighing the circumstances can the nonobvious involvement of the State and private conduct be attributed its true significance.

> "The question of whether a particular conduct is 'private' turns on whether there is sufficiently close nexus between the State and challenge action of the regulate entity so that the challenge action of the latter may be fairly treated as that of the State itself." **Jackson vs. Metropolitan Edison Company,** 419 U.S. 345, 95 S.Ct. 449, 453, 42 L.Ed. 2d 477.

Here, the American Bar Association is not a regulated entity but, rather, an agent of New Jersey Supreme Court. See **United States vs. Price,** 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed. 2d 267; **Fulton vs. Emerson Electric Company,** 420 F. 2d 527 (5th Cir. 1969); **Dreyer vs. Jalet,** 349, F.Supp. 452 464 (SD Tex 1971), Aff'd 479 F.2d 1044 (5th Cir. 1973).

Thus, the New Jersey Supreme Court's adoption of Court Rule 1:24-2(b) and its interpretation and/or application of Court Rule 1:24-1(c) violates the equal-protection clause of the Fourteenth Amendment of the United States Constitution; the American Bar Association accreditation procedures adopted by this Court were conceived to and continue to discriminate against any and all minorities. In prior days when the rules were initially adopted, they were to keep Jews, Irish, Italians, Blacks, and women out of the schools, and the ranks of lawyers. Petitioner is Jewish. In today's society we tend to think of minorities as those being black, Mexican-American, Oriental, American Indian, etc., but not Jews and other people of European ancestry. The rules that were adopted in the 1920's with the express intent to discriminate against European immigrants, those same rules continue today to discriminate to the classifications of minorities in today's world. Not only do the accreditation standards discriminate, they are arbitrary and capricious in that, according to Donna Fossum, they have no basis in fact.

Petitioner is informed and believes and thereupon alleges that the New Jersey Supreme Court in 1979 allowed approximately 100 foreign students who were not graduates of American Bar Association-accredited schools to sit for the New Jersey Bar Examination. The waiver of Court Rule 1:24-2(b) for the 100 foreign students and the New Jersey Supreme Court's refusal to allow Petitioner to be admitted to practice in the State of New Jersey on the basis that he is not a graduate of an American Bar Association-approved school raises another issue of equal protection [see Footnote 2 in **Murphy vs. Egan, supra,**]. And the Court's waiver for the foreign students may be arbitrary and capricious and a denial of equal protection in that their education was not controlled by a sister-State Supreme Court.

In **Potter vs. New Jersey Supreme Court, supra,** the New Jersey Supreme Court justified the foreign-attorney waivers to allow the large Spanish-speaking population in the State to have attorneys that speak Spanish.

The New Jersey Supreme Court takes the position that all non-ABA-graduate attorneys are unfit, so that by waiving the rule for the foreign attorney that Court is discriminating against that minority population by providing, in that Court's view, "unfit attorneys."

Thusly, if a minority student has a Fourteenth Amendment equal-protection right to a legal education, coupled with an opportunity to take the Bar Exam, Petitioner, if not a member of a minority class, argues that he has a

correlative right of freedom of association under the First Amendment of the United States Constitution to obtain a full education exposed to all minorities, depriving them of educational and career opportunities. Therefore, Petitioner, who availed himself of California's educational opportunities (a more flexible "constitutional" system), is penalized for exercising his First Amendment right of association.

CONCLUSION

In summary, Petitioner will be brief. The New Jersey Supreme Court's delegation of its duties to the American Bar Association regarding a candidate's qualification for admission to the New Jersey Bar intentionally discriminates and/or deprives this Petitioner or any other person of the aforementioned constitutional guarantees.

Among the States which are known to be leaders in legal thought, New Jersey and California hold prominent positions. The California State Supreme Court **directly** regulates admission to the Bar. In 1980 it added an innovative, experimental section to the Bar Exam testing client-interviewing skill. Furthermore, it provides opportunity for all those who seek to join our noble profession. New Jersey, on the other hand, limits opportunity (liberty) directly. Societal and/or occupational mobility is one of the fundamental foundations of this country. Petitioner merely seeks to return home to be with his family and to earn a living in his chosen profession.

Jurisdiction to review the New Jersey Supreme Court's denial of Petitioner's Application for Waiver rests solely with this Court.

"On the other hand, a State Court's decision on an individual application may not be disturbed in an original suit in Federal District Court. Orders of a State Court relating to the omission, discipline and disbarment of members of its Bar may be reviewed only by the Supreme Court of the United States on certiorari to the State Court . . ." **McKay vs. Nesbitt,** 412 F.2d 846 (9th Cir. 1969), Cert. denied, 396 U.S. 960, 90 S.Ct. 435, 24 L.Ed. 2d 425 (1969).

"In exercising its judgment on an individual petition, a State Supreme Court performs a judicial act, **In re Summers,** 325 U.S. 561, 65 S.Ct. 1307, 89 L.Ed. 795 (1945), reviewable in the Supreme Court. See **Schware vs. Board of Bar Examiners, supra,** 353 U.S. at 238, 77 S.Ct. at 755; **Konigsberg vs. State of California,** 353 U.S. 252, 258, 77 S.Ct. 722, 725, 1 L.Ed. 2d 810 (1957). A Federal District Court in contrast does not sit as an Appellate Court and therefore lacks jurisdiction to review State Court actions by denying admission to the Bar, even though the denial allegedly involves deprivation of consitutional rights. **Doe vs. Pringle, supra,** 550 F.2d at 599; **Woodward vs. Virginia Board of Bar Examiners,** 454 F.Supp. 4, 6 (E.D. Va. 1978), aff'd 598 F.2d 1345 (4th Cir. 1979); **Feldman vs. State Board of Bar Ex-**

aminers, 438 F.2d 699, 704 (8th Cir. 1971); **Brown vs. Board of Bar Examiners, State of Nevada,** 623 F.2d 605."

For the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

GARY P. MILLER

SUPREME COURT
OF NEW JERSEY

SEPTEMBER TERM 1980
M-1244

FILED
SUPREME COURT
JUL 9 1981
Stephen W. Townsend
D2
Clerk

IN THE MATTER OF THE
PETITION
OF
GARY P. MILLER

ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion for relaxation of R. 1:24-2(c) is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice at Trenton, this 7th day of July, 1981.

Stephen W. Townsend
Clerk

APPENDIX "A"

PROOF OF SERVICE

STATE OF CALIFORNIA)

ss

COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid: I am over the age of eighteen years and not a party to the within entitled action; my business address is 612 North Bush Street, Santa Ana, California 92701.

On October 7, 1981, I served the within Petition For Writ of Certiorari on the interested parties in said action, by placing a true copy in a sealed envelope, with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed as follows:

James R. Zazzlai
Office of the Attorney General
State House Annex
Trenton, New Jersey 08625

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on October 7, 1981, at Santa Ana, California.

JACK GALLAGHER